Reply - Surreply

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July 11, 1997

The Federal Communications Commission
c/o Rick Chessen, Cable Services Bureau
1919 M Street, N. W.
Washington, D. C. 20554

Re: CS Docket No. 97-55

Dear Commissioners:

We write in response to your request for public comments in the above-referenced matter as strong supporters, practitioners and scholars of the First Amendment. We note that there has been a paucity of comments or replies directed at the constitutional problems inherent in the possibility that the Federal Communications Commission will officially sanction a rating system for television programming and then require that system be attached to television programs both by an icon visible at various points of the program and by an encoded signal that accompanies the broadcast. For that reason, we feel an obligation to introduce some measure of constitutional perspective about the road on which the Commission appears prepared to embark. We respectfully submit that the First Amendment places an insurmountable obstacle to government ratings and labels and urge the Commission not to travel down that path.

I. The Constitution Prevents the Government from Assuming a Guardianship over the Public Mind, including the Minds of Children

The First Amendment, as Justice Robert Jackson wrote, was designed to "foreclose public authority from assuming a guardianship of the public mind." *Thomas v. Collins*, 323 U.S. 516, 545 (1945)(Jackson, J., concurring). The system of labels and blocking technologies that would be prescribed by Commission action in this area runs contrary to that precept. The Constitution's free-expression guarantee, however, denies this sort of paternalistic authority to the government, reserving the choice of television fare instead to broadcasters and their audiences. Whatever the rationale employed to limit the content of television programs, it violates the Constitution "when government seeks to limit speech . . . because it is thought unwise, unfair, false, or dangerous." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 47 (D.C. Cir. 1977)(citations omitted). The basic rule applicable here was well stated by the U.S. Court of Appeals for the Seventh Circuit: "violence on television . . . is protected as speech, however insidious. Any other answer leaves government in control of . . . the institutions of culture, the great censor and director of which thoughts are good for us."

American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

That protecting children provides the inspiration for this possible measure does not significantly change the constitutional equation. While the Supreme Court has found that government may "adopt more stringent controls on communicative materials available to youths than on those available to adults," it has also noted that "[s]peech . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975).

In the successful challenge to the Communications Decency Act, the U.S. Supreme Court said that the government's interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, No. 96-511, slip op. at 29. As a result, even well-intentioned laws restricting protected speech on the basis of content constitute state-sponsored censorship. The *Reno* decision thus reaffirms the Court's longstanding hostility to content-based regulation of speech, particularly where the targeted expression is not defined with exacting precision. Any government-mandated rating system would suffer these flaws. Many of us are parents as well as First Amendment advocates; we nonetheless share the Court's expressed concerns that a justification based on protecting children has no limiting principle. If we desire greater guidance and information about the television programming to help our children make choices, private ratings, not government systems, would provide the constitutionally compatible approach.

II. The Proposal Most Likely to be Considered Would Involve Unconstitutional Discrimination between Speakers and among Content

It is fundamental to the nation's understanding of the First Amendment that free speech cannot be permitted to some speakers and not others for essentially the same content, nor may government "restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972).

First, as the industry proposal does, we understand the Commission's most likely proposal would exempt news, sports, and documentaries from the labeling and encoding requirements. We note that a recent analysis by Rocky Mountain Media Watch analyzing 100 newscasts in 55 cities concluded that crime, violence, terrorism and disaster make up 42 percent of late evening local newscasts. Yet, there is no basis for assuming that the First Amendment's protections apply any differently to these categories of speech than to entertainment programming, nor is there any basis for assuming that the influences on children that the legislation seeks to suppress are any different. In fact, the First Amendment's free expression guarantees contain no distinction between those who might be denominated as "press" and other speakers. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946)(Frankfurter, J., concurring)("'the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic.").

Instead, there is broad recognition in the caselaw that the same factors that impel protection for the press apply with equal vigor to the individual speaker wishing to convey information, whatever format that person adopts. The First Amendment's protections are "not dependent on the particular mode in which one chooses to express an idea." *Texas v. Johnson*, 491 U.S. 397, 416 (1989). Thus, "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1985)(citations omitted).

The very sensible reason for this is that the message conveyed through an entertainment medium can easily surpass a news report in both its urgency and the potency with which it communicates ideas. "What is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U.S.507, 510 (1948). The *Winters* Court went on to note that the "line between the informing and the entertaining is too elusive" to provide a basis for government regulation. *Id.* We submit that the First Amendment prohibits the burdening of speech considered entertaining while similar speech that somehow achieves the label of news remains unburdened.

By the same token, the "'First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of an entire topic.'" *Federal Communications Commission v. League of Women Voters,* 468 U.S. 364, 384 (1984)(quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980)). Violence is just such a topic that may not be carved out for restrictive treatment. Any other answer would present the "risk of an enlargement of Government control over the content of broadcast discussion of public issues" when presented through a television drama, comedy or movie. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973).

III. The Labeling and Encoding Requirements Would Amount to an Unconstitutional Form of Forced Speech

A government-sanctioned rating system would be legally indistinguishable from the mechanism rejected by the Supreme Court in *Bantam Books v. Sullivan,* 372 U.S. 58 (1963). There, the Court found that letters written to certain bookstores by the Rhode Island Commission to Encourage Morality in Youth and listing "objectionable" publications amounted to "a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress." *Planned Parenthood v. Agency for International Development,* 915 F.2d 59, 64 (2d Cir. 1990), *cert. denied,* 500 U.S. 952 (1991). As the Court recently observed, "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression." *Rosenberger v. University of Virginia,* 115 S.Ct. 2510, 2520 (1995). Both dangers identified by the Court would be present in an FCC-created television rating scheme.

The broadcast and encoding of these ratings into the signal raises compelled speech concerns that impermissibly "forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9 (1986). This, of course, is the purpose of the underlying legislation -- to create disincentives to programming that contains depictions or descriptions for violence. The censorious purpose and the form that the requirement takes -- namely, a brand of compelled speech -- provide two independent grounds by which the encoding requirement would be invalidated in court.

Even a requirement that a speaker recite undisputed and pertinent facts rather than create an opportunity for commentary, the Court has held, "would clearly and substantially burden the protected speech," even though the "factual information might be relevant to the listener" and "could encourage or discourage the listener" from participating in the activity. *Riley v. National Federation for the Blind*, 487 U.S. 781, 798 (1988). Instead, the Court held that those who do the speaking must have control over both the content and the means of their expression. The *Riley* Court found that allowing the marketplace to develop and disseminate such information is always preferable to "a prophylactic rule of compelled speech." *Id.*

Those who suggest that *Meese v. Keene*, 481 U.S. 465 (1987), gives the Commission all the authority it needs to impose a labeling requirement misapprehend the Supreme Court's decision in that case. First, the Court determined that the label in issue had "no pejorative connotation", *id.* at 484, because the requirement had been on the books for more that 40 years and was well understood by the public as merely notifying people of a film's "foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source." *Id.*, at 480, n. 15 (quoting with approval, *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting on other grounds). Critical to the *Meese* holding as well was the fact that the domestic distributor of the foreign films, as well as any theater owner displaying the works, were free to discard the label on the films as soon as it entered the country. *Id.* at 495 (Blackmun, J., dissenting); see also, *Block v. Meese*, 793 F. 2d. 1303, 1307 n. 1 (D.C. Cir. 1986) (Scalia, J.), *cert. denied*, 481 U.S. 1043 (1987).

Unlike the provision in the Foreign Agent Registration Act at issue in *Meese*, no such neutral purpose motivates the labeling requirement. Congressional sponsors of the provision flatly stated that the requirement was intended to change the content of television programming by discouraging viewership and advertising for programs that receive restrictive ratings. Moreover, unlike the label on the films in *Meese*, the label attached to the television programming would be mandatory for each and every viewing and cannot be removed by domestic distributors. These differences, we submit, represent fatal flaws for governmentally mandated television program ratings.

For all the foregoing reasons, we believe the Commission should follow the *Riley* Court's advice and allow the marketplace to respond to consumer dissatisfaction with the industry proposal. We urge that the Commission not promulgate a rating system of its own or a mandate to provide that system over the airwaves.

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